United States Department of Labor
Employees' Compensation Appeals Board

R.O., Appellant	)	
and	)	**Docket No. 10-872**
	)	**Issued: December 15, 2010**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Hines, IL, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
ALEC J. KOROMILAS, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 9, 2010 appellant filed a timely appeal from a September 28, 2009 decision of the Office of Workers' Compensation Programs granting a schedule award. His appeal is also timely filed from a January 28, 2010 decision denying his request for oral argument. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits and nonmerits of this case.

ISSUES

The issues are: (1) whether appellant has more than a one percent impairment of his left lower extremity and a one percent impairment of his right lower extremity, for which he received a schedule award; and (2) whether the Office properly denied appellant's request for review of the written record.

On appeal, appellant contends that the impairment determination was not proper as his condition has clearly worsened.[1]

FACTUAL HISTORY

On April 1, 2008 appellant, then a 39-year-old fire protection inspector, filed a traumatic injury claim alleging that, on March 7, 2008, while walking up the stairs of "Building 200" he felt a sharp pain in his right and left foot, which felt worse as the day progressed. He indicated that, as a result thereof, he suffered from plantar fasciitis. On July 29, 2008 the Office accepted appellant's claim for bilateral ankle sprains and bilateral plantar fibromatosis. It paid wage-loss compensation and medical benefits.

In a March 13, 2009 note, Dr. Malcolm Herzog, appellant's podiatrist, opined that appellant reached maximum medical improvement on this date. He reported that appellant did report some pain to palpatation of the plantar aspect of his right and left heel, but noted that because appellant was not working his feet were not bothering him as much. Dr. Herzog further reported that upon examination of appellant's foot and ankle, no decrease in strength, atrophy or ankylosis was noted. He noted that appellant continued to subjectively complain of pain in the right and left heel. Dr. Herzog then indicated that appellant stated that he was 30 percent impaired from the injuries he sustained at work. In a note of the same date, he prescribed orthotic inlays to treat a partial subluxation of the subtalar and mid tarsal joints, possible plantar fasciitis and heel spur syndrome. Dr. Herzog listed appellant's diagnoses as plantar fasciitis, tarsal tunnel syndrome, tenosynovitis of foot or ankle and bursitis.

On June 2, 2009 the Office asked the Office medical adviser to review the record and determine the permanent functional loss of use of the lower extremities.

In a June 10, 2009 medical opinion, the Office medical adviser reviewed appellant's case. He noted that, according to Dr. Herzog's report of March 13, 2009, appellant's pain was primarily on the plantar aspect of the heel bilaterally. The Office medical adviser noted that appellant had some relief after an injection into the dorsal aspect of the foot. He indicated that the physical examination showed no atrophy, weakness or ankylosis and that specific measurements of motion were not recorded. Applying the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (A.M.A., *Guides*) (6th ed. 2009) the Office medical adviser found that, utilizing the diagnosis-based impairment, appellant should be awarded one percent permanent impairment to his right lower extremity for Class 1, Grade B, plantar fibromatosis (GMFH 1, GMPE 1, GMCS 0).[2] He utilized the same data and reasoning to conclude that appellant was also entitled to one percent impairment rating to his left lower extremity. The Office medical adviser concluded that as appellant had a diagnosis of plantar

[1] Appellant submitted new evidence on appeal. As this evidence was not before the Office at the time it issued the September 28, 2009 decision, the Board is precluded from reviewing it for the first time on appeal. *See* 20 C.F.R. § 501.2(c)(1). Appellant may submit this evidence together with a formal written request for reconsideration pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. § 10.606.

[2] A.M.A., *Guides* 501, Table 16-2. With regard to the abbreviations utilized by the Office medical adviser, GMFH refers to functional history, GMPE refers to physical examination and GMCS refers to clinical studies. A.M.A., *Guides* 498, Figure 16-2.

fibromatosis with correlating findings on physical examination, the diagnosis-based impairment was "the most appropriate method of rating his impairment."

On August 6, 2009 appellant filed a claim for a schedule award.

By decision dated September 28, 2009, the Office issued a schedule award for one percent loss of use of the left lower extremity and a one percent loss of use of the right lower extremity.

In an appeal request form dated October 12, 2009 but received by the Office on January 22, 2010, appellant requested review of the written record by an Office hearing representative. The postmark date is listed as January 19, 2010.[3]

By decision dated January 28, 2010, the Office denied appellant's request for a review of the written record as it was untimely filed. It also reviewed his request under its discretionary authority and determined that the issue could be equally well addressed by filing a request for reconsideration and submitting evidence not previously considered, which established that he was entitled to greater percentage of impairment than what he was previously awarded.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Federal Employees' Compensation Act[4] and its implementing federal regulations[5] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. However, the Act does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law for all claimants, the Office has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.[6] For decisions after February 1, 2001, the fifth edition of the A.M.A., *Guides* is used

[3] In a letter and an appeal request, both dated October 19, 2009 but also received on January 22, 2010, appellant requested reconsideration. Submitted with these requests was an October 22, 2009 report by Dr. Herzog. By decision dated April 22, 2010, the Office reviewed appellant's request for reconsideration on the merits and denied reconsideration because it found that the evidence was not sufficient to warrant modification of the September 28, 2009 decision. However, appellant filed an appeal with this Board regarding his schedule award termination on February 9, 2010. From that point forward, the Board had jurisdiction over the issue. The Office may not exercise concurrent jurisdiction over the same issue on appeal. Because the April 22, 2010 decision on reconsideration from the schedule award decision pertained to the issue on appeal before the Board, the Office had no jurisdiction to issue that decision. Accordingly, the Office's April 22, 2010 decision is null and void. *See D.S.*, 58 ECAB 392 (2007); *Douglas E. Billings*, 41 ECAB 880 (1990). The Board further notes that as Dr Herzog's October 22, 2009 report was submitted after the issuance of the September 28 2009 decision setting appellant's schedule award, the Board may not consider this report for the first time on appeal. *See* 20 C.F.R. § 501.2(c)(1); *see supra* note 1.

[4] 5 U.S.C. § 8107.

[5] 20 C.F.R. § 10.404.

[6] *Id.* at § 10.404(a).

to calculate schedule awards.[7] For decisions issued after May 1, 2009, the sixth edition will be used.[8]

In addressing lower extremity impairments, the sixth edition requires identifying the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on functional history (GMFH), physical examination (GMPE) and clinical studies (GMCS).[9] The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).[10]

Office procedures provide that, after obtaining all necessary medical evidence, the file should be routed to the Office medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the medical adviser providing rationale for the percentage of impairment specified.[11]

ANALYSIS -- ISSUE 1

It is established that when the examining physician does not provide an estimate of impairment conforming to the proper edition of the A.M.A., *Guides*, the Office may rely on an impairment rating provided by the Office medical adviser.[12] Dr. Herzog reported appellant's subjective complaints of pain in the right and left heel and noted no decrease in strength, atrophy or ankylosis of the foot or ankle, but did not make a rating pursuant to the A.M.A., *Guides*. In fact, he merely indicated that appellant believed that he was 30 percent impaired from the injury he sustained at work.

The Office medical adviser properly noted that appellant's claim was accepted for plantar fibromatosis. The sixth edition of the A.M.A., *Guides* provides that lower extremity impairments be classified by diagnosis which is then adjusted by grade modifiers according to the formula noted above.[13] Table 16-2, page 501, of the sixth edition of the A.M.A., *Guides* provides that plantar fibromatosis can be classified from Class 0 to Class 4, with Class 1 defined as a mild case. The Office medical adviser determined that appellant had a Class 1, Grade B impairment in both lower extremities which yielded an impairment of one percent. He then applied the grade modifiers and determined that appellant had modifiers of one percent for functional history, one percent of physical examination and zero percent for clinical studies. The Office medical adviser found that appellant's diagnosis of plantar fibromatosis with physical examination findings correlated to the impairment found by diagnosis-based impairment and

[7] Federal (FECA) Procedure Manual, Part 3 -- Medical, *Schedule Awards*, Chapter 3.700, Exhibit 4 (June 2003).

[8] FECA Bulletin No. 09-03 (issued March 15, 2009); *see also supra*, note 7, Exhibit 1 (January 2010).

[9] *Supra* note 2 at 494-531; *see J.B.*, 61 ECAB __ (Docket No. 09-2191, issued May 14, 2010).

[10] *Supra* note 2 at 521.

[11] *See* Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(d) (August 2002).

[12] *See J.Q.*, 59 ECAB 366 (2008).

[13] *Supra* note 8.

therefore the diagnosis-based impairment was the most appropriate method for evaluating his impairment.

The Board finds that the Office medical adviser properly explained how he calculated that appellant had one percent impairment to each lower extremity by applying the A.M.A., *Guides*. As the Office medical adviser's report is the only evaluation that conforms to the Office procedures and contains specific references to the correct edition of the A.M.A., *Guides*, it constitutes the weight of the medical evidence.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of the Act provides that, before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his claim before a representative of the Secretary.[14] Section 10.615 of the federal regulations implementing this section of the Act provides that a claimant shall be afforded a choice of an oral hearing or a review of the written record.[15] The Office's regulations provide that the request must be sent within 30 days of the date of the decision (as determined by postmark or other carrier's date marking) for which a hearing is sought and also that the claimant must not have previously submitted a reconsideration request (whether or not it was granted) on the same decision.[16] The Office has discretion, however, to grant or deny a request that is made after this 30-day period.[17] In such a case, it will determine whether a discretionary hearing should be granted and, if not, will so advise the claimant with reasons.[18]

ANALYSIS -- ISSUE 2

The Office issued its decision granting appellant's schedule award on September 28, 2009. Accordingly, appellant had 30 days from that date to request an oral hearing or review of the written record. His request for review of the written record was dated October 12, 2009. However, the postmark clearly indicates that appellant sent this request on January 19, 2010, over 30 days after the issuance of the September 28, 2009 decision. Therefore, the Board finds that he was not entitled to a review of the written record as a matter of right as his request was untimely.

The Office also has the discretionary power to grant a review of the written record when a claimant is not entitled to a review of the written record as a matter of right. In the January 28, 2010 decision, it properly exercised its discretion by stating that it had considered the matter and denied appellant's request for a review of the written record on the basis that his schedule award

[14] 5 U.S.C. § 8124(b)(1).

[15] 20 C.F.R. § 615.

[16] *Id.* at 10.616(a).

[17] *Id.* at § 10.616(b).

[18] *James Smith*, 53 ECAB 188 (2001).

claim could be addressed through a reconsideration application. The Board has held that, as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deductions from established facts.[19] The evidence of record does not establish that the Office abused its discretion by denying appellant's request for a review of the written record.

CONCLUSION

The Board finds that appellant has not established that he has more than one percent impairment of his left lower extremity and one percent impairment of his right lower extremity, for which he received schedule awards. The Board further finds that the Office properly denied his request for review of the written record as untimely filed.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated January 28, 2010 and September 28, 2009 are affirmed.

Issued: December 15, 2010
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

[19] *Daniel J. Perea*, 42 ECAB 214, 221 (1990).